



Private Copying Forum  
(Web-meeting, 11 February 2016)

Notes

Participants:

Christine Mergoupi	AEPI
David Kitzinger	ARTISIUS
Anna Bucci	CPCC
Verena Wintergerst	GEMA/ZPUE
Katarina Matanovac	HDS
Satoshi Watanabe	JASRAC
Hugo Cox	PRS
Serge Vloeberghs & Martine Loos	SABAM
François Stroobant	SABAM/AUVIBEL
David El Sayegh	SACEM/SDRM – Chairman
Charles-Henri Lonjon	SACEM/Copie France
Fraser Turnbull	SOCAN
Daniela Amodeo & Alessandra Amendola	SIAE
Helle Moalem	Copydan
Hester Wijminga	Stichting de Thuis kopie
Eric Vades Martinez	RUR
Burak Ozgen	GESAC
Mitko Chatalbashev	BIEM/CISAC Director of European Affairs
Laure Margerard	
Marie-Claude Rasmussen	

*Apologies for absence received from Paul Fisher (AUME)*

The meeting was chaired by David El Sayegh, SACEM.

## 1. Lessons of the latest decisions of the CJEU: Presentation by D. El Sayegh

### Contractual authorization and Private Copying

In 2013, there was a first ruling called VG Wort followed in 2015 by another important ruling (Copydan) referring to the same issue: on how to coordinate contractual authorization and the private copying exception?

Contractual authorization to allow the making of private copies has no legal object if there is a private copying authorization provided by the law.

The issue is very favorable as it draws a clear frontier between the contractual authorization and the private copying reproduction.

If certain copies fall under the scope of the private copying exception, they could not be encompassed by the contractual authorization, and could not be remunerated through an agreement. It secures the compensation.

The consequences are that it weakens the recommendation of the Vitorino report that wished to make contractual authorizations for online services prevail to the detriment of the private copying exception, and precludes any possibility of subjecting compensatory remuneration to a contract when it constitutes the recompense for a legal exception.

### Remuneration for private copying and use of recording media (Amazon and Copydan cases)

The important question raised in the Amazon case was: is the indiscriminate application of the private copying remuneration to any purchaser, whether a legal or a natural person, on the placing on the market of recording media, combined with a reimbursement scheme, permissible?

The Court gave a clear answer and said yes subject to the existence of sufficient practical difficulties in determining the purpose of the use of the purchased medium, and the need to set up an effective scheme for the reimbursement of the private copying remuneration when the use of such medium is not for private copying.

Another pending case (Nokia vs SIAE) in the ECJ concerns the Italian law and how it organizes the reimbursement scheme. A hearing is expected end-February. An important decision could be expected at the end of the semester regarding the reimbursement and how it should function.

The relevant criterion is the use.

### Remuneration for private copying and schemes to help social and cultural actions

The answer from the Court in the Amazon case was positive.

Directive 2001/29 does not impose on Member States the obligation to ensure that right holders receive the cash payment of all the private copying remuneration.

Member States enjoy a wide discretion and can therefore provide that part of that compensation is to be provided in the form of indirect compensation.

The fact that the fair compensation must be regarded as recompense for the harm suffered by the right holders is not incompatible with the principle of indirect compensation.

Such a scheme is compatible with the objectives of Directive 2001/29 which are to ensure that creators and performers receive the necessary resources to continue their creative and artistic work and to safeguard their independence and dignity.

Such a scheme must actually benefit the right holders and must not be discriminatory.

[Remuneration for private copying and cross-border trade of recording media \(Amazon case\)](#)

Regarding the cross-border circulation of devices, the Amazon ruling mentions that the remuneration should be paid in the country where the end consumer is located.

[Exception for private copying and technological measures](#)

[\(VG Wort and Copydan cases\)](#)

Does the possibility of applying technological measures render the private copying remuneration inapplicable?

The answer from the Court was clearly no. Technical measures should however be taken into account to determine the level of the compensation.

[Exception for private copying and legality / illegality of the source \(ACI ADAM and Copydan cases\)](#)

Can the remuneration for private copying take into account the private copies made from an illegal source?

The answer from the Court of Justice was negative.

[Minimal prejudice \(Copydan case\)](#)

Who decides and under what conditions that exemption from payment of fair compensation is possible when private copies are made of protected works, i.e. that the prejudice caused to the right holders is minimal?

The answer from the Court was predictable. It is within the discretion of the Member States to set the threshold for such prejudice and such threshold must be applied in a manner consistent with the principle of equal treatment.

This is a key point as it means no discrimination between the media at issue.

This is a very good way to put pressure on Member States when they are very reluctant to include certain devices within the private copying remuneration scheme.

[Private copying and devices belonging to a third party \(Copydan case\)](#)

Can there be private copying when a reproduction is made by a natural person by or with the aid of a device belonging to a third party?

This is a very complex issue (i.e. cloud computing technology).

There was a positive answer from the Court. The Infosoc Directive did not mention, and therefore did not consider relevant, the characteristics of the devices through which copies are made for private use. Consequently, it is up to the Member States to decide on the question whether a device used by a private individual to make copies for private use must belong to that person or whether it may belong to a third party.

This is again a very important issue in that it could enable the private copying compensation to apply to NPVR.

Very recently, and thanks to the Copydan case, the French law adopted a provision which aims to include NPVR copies. A final decision regarding this legal change will be taken end-June.

Possibility for the creators to share the fair compensation with their publishers (Reprobel case)

Can a Member State allocate a share of the fair compensation to the publishers of the protected works?

Unfortunately the answer from the Court was negative if such share was directly attributed by the law to the publishers on the author's share.

In conclusion, these decisions reinforce the private copying remuneration scheme on such essential questions as:

- . Contractual authorizations for online services
- . The schemes to help cultural and social actions
- . The cross-border trade of media in countries which have adopted the principle of remuneration
- . The articulation with technological measures
- . The legality, or illegality, of the source

3 cases are pending related to private copying remuneration in Spain, Italy and Austria and therefore important decisions should be taken in the coming months.

We are in a better position than 2 years ago. The Court's rulings have reinforced the legitimacy of the private copying exception even if the Court's decisions are not all favorable to right holders.

## 2. Roundtable on national situations

### Denmark | Presentation by Helle Moalen (COPYDAN v Nokia)

H. Moalen presented the background of the case which started in April 2010: Does the Danish remuneration system include detachable SD cards for mobile phones? Nokia refuted its liability to pay private copying levies on SD cards. In 2012, the Danish Court asked the CJEU for a preliminary ruling on the interpretation of the Infosoc Directive.

The central issue: Is the Danish implementation of article 5 (2) (b) of the Infosoc Directive in conformity with EU law? Nokia said: the levy on SD cards is in violation of EU law because copying on SD cards constitutes minimal harm and there is no levy on the internal memory in mobile phones. Therefore this violates the principle of equal treatment.

The decision in March 2015 confirmed that the fair compensation must be paid when at least one of the functions of the medium enables the user to use it for private copying purposes. There has to be legitimate objective reasons for not subjecting the internal memory in mobile phones to a private copying levy. A levy should also be implemented on the internal memory of mobile phones.

The case clearly indicated that the Danish remuneration system is not consistent with the EU principle of equal treatment, as it only carries levies on detachable media. The case should resume before the Danish Court of Appeals at the end of August 2016. It mainly concerns the legality of the levy on SD cards.

## Netherlands | Presentation by Hester Wijminga (Stichting de ThuisKopie)

H. Wijminga reported on the Dutch system based on the Copyright Act and the levies decree as last amended (1/1/2015), including: – the result of the court case won against the Dutch State which failed to uphold the obligation to achieve a certain result (Opus case); – the result of the ACI case, with tariffs lowered by 30% in 2015; – the upfront and refund provisions for professional use which are ECJ jurisprudence compliant; – verdicts: Reprobel/HP, Copydan.

She also reported on the following court cases: Acer (illegal sources), Nokia (Microsoft Mobile), Telecom providers and Imation I and II.

## Russia | Erik Valdes Martinez (RUR)

The private copying system is strongly supported by the government.

The organization was accredited in 2015 for a further 10 years. According to the law, there is a governmental rule (or regulation) on fees for free reproduction of phonograms and audiovisual works. Private copying is 1% when the recording device is manufactured in Russia or imported into the territory. A lot of equipment, including mobile phones, PCs and hard discs, are inside the scope of the remuneration system. The problems encountered in Russia are different from the European ones. There are also some court cases against Nokia, Sony and Dell. Dell argued that some equipment should be considered as professional equipment which has nothing to do with private copying. The case RUR vs. Dell is still going on.

## Japan | Satoshi Watanabe

S. Watanabe reported that the Copyright Law was amended to introduce the remuneration system for private audio and video recording in 1992.

Concerning the collections, due to a falling demand for CD-Rs for music, the audio remuneration has declined to approximately 4-5% of its peak, and the 2012 Supreme Court ruling confirmed defeat for the right holders' side in the Toshiba lawsuit, with a collection amount in 2013 down to zero.

In November 2013, the coalition of 85 right holders groups in Japan "Culture First" held a press conference and proposed the creation of a new remuneration system based on two principles: the subject of the remuneration should be the copying functions that are provided for the purpose of private copying, and the supplier of the copying function should be obligated to pay remuneration. This new system is under discussion in the government's sub-committee.

## Belgium | Serge Vloeberghs

The CJEU's decision of November 2015 in the Hewlett Packard v. Reprobel case confirmed that fair compensation is due for private copying and reprography, that importers and manufacturers of equipment are liable for payment of the compensation but that the only right holders who may receive the compensation are authors. Accordingly, the Belgian legislation granting publishers a share of the compensation is not consistent with European law. The final judgment from the Belgian Court of Appeal in this case is not expected before 2017, if not 2018.

## Canada | Anna Bucci

According to the Copyright Act, the private copying levy can only be applied to audio recording media. Furthermore, the use of CDRs and revenues have declined by 78%. There is now a new government favourable to copyright and copyright owners, which may lead to an amendment of the Copyright Act to be able to continue the private copying regime in Canada. A survey will be sent in the coming weeks to the European societies to get information on their own regimes to be able to make a proposal to the government.

### France | Charles-Henri Lonjon

The legal basis has been validated by the French Administrative Supreme Court.

More than 10 legal court decisions have confirmed the right for Copie France to receive a “fair compensation” even in the absence of a tariff scheme.

After a 3-year boycott, industrial representatives agreed to come back to work within the commission entitled to set the tariffs.

Since 2011, Copie France has been enforcing the ECJ’s OPUS decision.

Collections are stable, from €230 Mio in 2013 to €225 Mio in 2015, the smartphones market representing 40% of the total collections. However, tablets are slowing and not as successful as expected.

### Germany | Verena Wintergerst

Two agreements were concluded on mobile phones and tablets. Hopefully more agreements will be reached this year.

### Hungary | David Kitzinger

Collections are smaller for the first time in five years. However mobile phones are dominant.

Regarding levies, longtime agreements are still effective with the most influential business associations.

There are no legal threats or interesting court cases.

### United Kingdom | Hugo Cox

In 2014 the UK government introduced a Private Copying exception without compensation.

There is not much news in the UK, except on the ground there was no minimal harm. Several associations of rightsholders including PRS instituted judicial review proceedings against the government at the end of 2014 to demand that the private copying exception that finally came into force in October 2014 be subject to fair compensation in line with the European Copyright Directive. In June 2015, the High Court ruled against the position of the government which decided in the end to withdraw the very principle of the private copying exception. At the present time, there is a very slight possibility that it will be reintroduced in the near future.

H. Cox proposed providing economic research on how much people are willing to pay for private copying.

### 3. AOB

Question from Serge Vloeberghs:

As Member States have an obligation to achieve a certain result in guaranteeing fair compensation for right holders, it would be good if the Secretariat could ask all the BIEM members to send out all the information on their analysis in order to get some inspiration from the results in other countries in quantifying the prejudice.

*(\*) All the presentations proposed at the Forum are available on the BIEM website (under ISSUES/Private Copying)*